Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TAMKO ROOFING PRODUCTS, INC.,

Petitioner,

v.

UNITED STEEL WORKERS OF AMERICA,
LOCAL 1071L,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an arbitral award reinstating an employee — who has been terminated for racial harassment of a *non*-company employee — on the ground that the employer's disciplinary authority is strictly limited to punishing racial harassment of other company employees violates public policy and is thus unenforceable by a court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tamko Roofing Products, Inc. has no parent corporations, and no publicly held company owns 10% or more of the corporations's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 7

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT CONCERNING WHETHER ARBITRAL AWARDS REINSTATING EMPLOYEES WHO HAVE ENGAGED IN HARASSMENT VIOLATE PUBLIC POLICY AND ARE UNENFORCEABLE. 8

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING AND IN NEED OF PROMPT RESOLUTION BY THIS COURT. 13

III. THE DECISION BELOW MISUNDERSTANDS AND MISAPPLIES THE PUBLIC POLICY DOCTRINE. 15

A. The Public Policy Doctrine Ensures That Courts Do Not Enforce Illegal, Immoral, or Unconscionable Contracts. 16

TABLE OF CONTENTS
(Continued)

Page

B. The Arbitral Award In This Case Violates Well-Defined And Dominant Public Policies Against Contracts Condoning Racial And Sexual Harassment In The Workplace And Favoring Voluntary Compliance With Anti-Discrimination Laws. 19

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Anthony v. County of Sacramento, 898 F. Supp. 1435 (E.D. Cal. 1995) 22

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 13

Bobbitt v. Rage Inc., 19 F. Supp. 2d 512 (W.D.N.C.) 1998 22

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 14, 26

Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) 22

Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO, 959 F.2d 685 (7th Cir. 1992) 11, 24, 27

Communication Workers of Am. v. S.E. Elec. Coop., 882 F.2d 467 (10th Cir. 1989) 11, 24, 27

E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000) ..... *passim*

Emporium Capwell Co. v. W. Addition Cmty. Org., NLRB, 420 U.S. 50 (1975) 23

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 14, 25

Handy Andy, Inc., 228 NLRB 447 (1977) 24

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 14, 22

Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775) 17

Hurd v. Hodge, 334 U.S. 24 (1948) 14, 18, 21

Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler, 481 U.S. 851 (1987) 15

TABLE OF AUTHORITIES
(continued)

Page

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 896 (1966) 19
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) 18
Laborers' Int'l Union of N. Am., AFL-CIO, Local 478, 204 NLRB 357 (1973) 24
Laroche v. Denny's Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999) 22
Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) 19
Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95 (1962) 15
McCaleb v. Pizza Hut of Am., Inc., 28 F. Supp. 2d 1043 (N.D. Ill. 1998) 22, 23
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) ... 22
Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO, 915 F.2d 840 (2d Cir. 1990) 9, 10, 24, 26
Oscanyan v. Arms Co., 103 U.S. 261 (1880) 16
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 13
Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) 22
Runyon v. McCrary, 427 U.S. 160 (1976) 21
Shelley v. Kraemer, 334 U.S. 1 (1948) 18
Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) 23
Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) . 8, 9, 26
Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979 (1994) 13

TABLE OF AUTHORITIES
(continued)

Page

Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957) 19, 23
Trist v. Child, 88 U.S. 441 (1874) 16, 17, 18
United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) 17
United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) 20
W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757 (1983) 17, 19
Weil v. Neary, 278 U.S. 160 (1929) 14
Westvaco Corp. v. United Paperworkers Int'l Union, AFL-CIO, 171 F.3d 971 (4th Cir. 1999) ... 10, 11, 24, 27

Statutes & Rules

28 U.S.C. § 1254(1) 1
29 U.S.C. § 185 1
42 U.S.C. § 1981 ..... 1, 22
42 U.S.C. § 2000e-2(a) 1
29 C.F.R. § 1604.11 24

Miscellaneous

Chris Baker, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. Cin. L. Rev. 1361 (1993) 13, 15, 27

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TABLE OF AUTHORITIES
(continued)

Page

Stephen Buehrer. *A Clash Of The Titans: Judicial Deference To Arbitration And The Public Policy Exception In The Context Of Sexual Harassment*, 6 Am. U. J. Gender & L. 265 (1998) 12, 16

Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17 (1994) 8, 13, 27

Restatement (Second) of Contracts § 178(1) 16

Richart T. Seymour & John F. Aslin, *Equal Employment Law Update* (2000 ed.) 14

PETITION FOR A WRIT OF CERTIORARI

Tamko Roofing Products, Inc. ("Tamko") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-20a) are not reported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 3, 2001. The court of appeals denied Tamko's petition for rehearing on September 4, 2001. Pet. App. 48a-49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1981 and 2000e-2 of Title 42, United States Code, and section 185 of Title 29, United States Code, are set forth in the appendix. Pet. App. 21a-32a.

STATEMENT

Since the Civil War, the nation has taken a strong stand, in both positive law and federal public policy, against race discrimination. Congress long ago enacted laws prohibiting race discrimination by State and local actors. The federal courts have long refused to enforce, for example, racially restrictive covenants. And, in the private sector, the strong federal policies against race discrimination in the workplace and in favor of employers' voluntary compliance with the prohibitions on race discrimination are, among other things, grounded in positive, statutory law, including the anti-discrimination provisions of Title VII, 42 U.S.C. § 2000e-2(a), and 42 U.S.C. § 1981, and the federal common law of labor-management relations authorized by 29 U.S.C. § 185.

This case presents the important and recurring question whether a labor arbitrator's award reinstating a discharged employee on the ground that, under work rules established under a collective bargaining agreement, the employer is without authority to discharge employees for racially harassing *non*-employees violates these fundamental federal public policies against race discrimination and in favor of voluntary employer compliance with them. The district court in this case recognized that such an arbitral award is indeed at odds with federal public policy and properly refused to enforce that arbitral award. The contrary decision of the court of appeals is at odds with the practice of federal courts not to approve contracts that condone racial discrimination. It rests upon the erroneous premises, rejected by other courts of appeals, that an employer's failure to terminate employees who racially harass non-employees does not expose the employer to liability under Title VII or section 1981 and that federal law of collective bargaining allows an employer to agree with a union not to discharge employees who engage in such racial discrimination.

The decision below deepens an extant judicial conflict regarding whether public policy permits arbitrators to order the reinstatement of employees who are discharged for sexually or racially harassing non-employees. Indeed, the decision stands alone among judicial decisions in allowing such employees to be reinstated without *any* discipline having been imposed This Court's intervention is necessary.

1. Tamko, a manufacturer and distributor of commercial and residential roofing products, maintains a manufacturing facility in Tuscaloosa, Alabama. Pet. App. 6a. Tamko retains the services of Cummings Truck Line ("Cummings") to transport materials to and from its Tuscaloosa plant. During the relevant time frame, Cummings employed Nathaniel Williams, an African American, to work full-time at the Tamko facility as a truck spotter, coordinating the movement of Cummings trailers into and out of Tamko's loading

dock bays with the personnel in Tamko's shipping and receiving department. Pet. App. 6a-7a. One such Tamko shipping employee was Bobby Campbell, the grievant. Pet. App. 6a.

On October 27, 1997, Tamko's Tuscaloosa shipping department supervisor received a complaint from Mr. Williams about Mr. Campbell's conduct. Specifically, Mr. Williams notified Tamko that Mr. Campbell had racially harassed him. Pet. App. 8a.

In the course of its prompt investigation of this charge, Tamko learned from Mr. Williams that Mr. Campbell had repeatedly harassed Mr. Williams using offensive, racist epithets such as "gig-a-boo," "biscuit lips," and "porch monkey" to refer to Mr. Williams. Pet. App. 46a. Mr. Williams indicated that this conduct had been occurring "often like once every week or twice a week or just nearly every week." Pet. App. 47a. The last such incident, which prompted Mr. Williams to complain to Mr. Campbell's supervisor, had occurred that very morning (of October 27, 1997), at approximately 6:00 a.m. Pet. App. 6a. While the witnesses' recollections vary as to the precise words that Mr. Campbell uttered on this particular occasion, it is undisputed that the substance of the remarks suggested that Mr. Williams should paint his face white so that Mr. Campbell could see him more easily. Pet. App. 7a-8a.

On the basis of its investigation of Mr. Williams's complaint, Tamko terminated Mr. Campbell's employment. Pet. App. 9a-10a. The Tuscaloosa plant general manager who made the discharge decision, Tom Deloughery, explained that the decision to fire Mr. Campbell was based upon the seriousness of Mr. Campbell's conduct coupled with the fact that Mr. Campbell had attended a workshop focusing on the prevention of racial, sexual, and other forms of harassment in the workplace less than two weeks before the incident that prompted Mr. Williams's complaint. Pet. App. 10a. Mr. Deloughery pointed to Tamko's policy against harassment in the workplace. Pet. App. 10a.

2. Mr. Campbell's union, respondent United Steelworkers of America, AFL-CIO, Local 1071L (the "Union"), processed Mr. Campbell's grievance through the procedure set out in the parties' collective bargaining agreement (the "CBA"). Pet. App. 10a. Tamko denied the grievance, and the Union submitted the matter to arbitration pursuant to the terms of the CBA. Pet. App. 39a.

The CBA provides that "[e]mployees shall not be discharged or suspended without just cause." Pet. App. 39a. The CBA further provides for the arbitration of grieved disciplinary measures, and provides that, in such arbitrations, "the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. . . . *The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline.*" Pet. App. 40a-41a (emphasis added).

On September 10, 1998, the arbitrator, J. Reese Johnston, Jr., sustained the grievance, directing Tamko to reinstate Mr. Campbell, and "to compensate him for all lost wages and other benefits and without a break in his seniority." Pet. App. 45a. Although he made no findings with respect to the earlier episodes of harassment called to his attention by Tamko, the arbitrator found that the reported incident of racial harassment had, in fact, occurred on October 27, 1997. Pet. App. 35a. The arbitrator held, however, that Mr. Campbell should nonetheless be reinstated because of the arbitrator's construction of the Tamko anti-harassment policy's prohibition that "[n]o employee of Tamko should harass others, be they co-workers, subordinates or supervisors." Pet. App. 43a.

Specifically, reading the final clause of the sentence as a limitation on the word "others," the arbitrator found that Tamko "prohibits

har[]assment only to co-workers, subordinate or superior," and not harassment of non-employees, even those working full-time on Tamko premises such as Mr. Williams. Pet. App. 43a. Indeed, the arbitrator ruled that "[i]t would not be equitable . . . to stretch the wording which is the Company's wording in its Prevention of Har[]assment Policy to cover the har[]assment of people not co-workers, subordinates or supervisors." Pet. App. 43a.

Based upon this premise, the arbitrator held that the CBA did not allow termination of Mr. Campbell in these circumstances. He concluded that "the Company charged the Grievant with an offense that can only arise in har[]assment of a co-worker of the Grievant." Pet. App. 44a.

3. On October 6, 1998, Tamko filed a complaint in district court, seeking vacatur of the arbitrator's award on the ground, *inter alia*, that the award violates federal public policy. On August 31, 2000, the district court granted Tamko's motion for summary judgment, denied the Union's summary judgment motion, and vacated the arbitrator's award. Pet. App. 20a.

The district court began its analysis with the premise that, "[u]nless the award is merely the arbitrator's 'own brand of industrial justice' or does not 'dra[w] its essence from the collective bargaining agreement,' a court is generally bound to enforce the award." Pet. App. 12a. But the district court also recognized that "[t]here is a narrow exception to the general judicial enforceability of arbitration awards: an arbitration award that contravenes public policy is unenforceable." Pet. App. 13a. Specifically, the district court found that "a court may refuse to enforce a[n] award . . . where the award would violate some explicit, well-defined and dominant public policy." Pet. App. 14a.

In this regard, the district court found that "[r]acial harassment in the workplace violates 42 U.S.C. § 2000e (Title VII)'s ban prohibiting racial discrimination . . . ." Pet. App.18a. The district

court also found that "42 U.S.C. § 1981, whose roots have grown and developed over the last one and a third century, and particularly in the la[st] nine years, establishes a dominant national policy forbidding racial discrimination and harassment in the workplace." Pet. App. 19a. The court further found that "the national policy is binding on unions as well as employees." Pet. App. 19a. Finally, noting that "Bobby Campbell violated this public policy while performing his duties as an employee of Tamko," the court held that the arbitral award requiring Mr. Campbell's reinstatement with back pay "should not be enforced by this court." Pet. App. 20a.

4. On appeal, the Eleventh Circuit reversed. At the outset of its analysis, the court of appeals acknowledged that "an arbitral award which is contrary to public policy is unenforceable." Pet. App. 2a. The court of appeals further acknowledged that, under this Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17*, 531 U.S. 57 (2000), the court must treat the arbitral award as if it represents an agreement between the parties as to the proper meaning of the collective bargaining agreement. Pet. App. 2a. Accordingly, the court of appeals recognized that "the issue in this case is whether the arbitral award, which ordered that Campbell be reinstated to his previous position with back pay, is contrary to an explicit, well-defined and dominant public policy." Pet. App. 2a-3a. But, turning to its own analysis of the public policy issue, the Eleventh Circuit concluded that the arbitrator's award did not violate such a public policy.

In so concluding, the court of appeals did not deny that federal anti-discrimination and labor laws exhibit a dominant and well-defined public policy against racial harassment in the workplace. Rather, the court concluded that "nothing in the award is inconsistent with such a policy." Pet. App. 3a. The court asserted, without explanation, that the award "does not condone [the grievant's] harassing behavior . . . ." Pet. App. 3a. The court of appeals further asserted, without analysis, that "[r]einstating with

backpay, i.e., not discharging, an employee who made the single racially insensitive remark that Campbell did does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation." Pet. App.3a. The court concluded, "[t]herefore, . . . the award does not run contrary to an explicit, well-defined, and dominant public policy." Pet. App. 3a.

Finally, the court of appeals opined that, after reinstating Mr. Campbell with back pay, Tamko might attempt to impose some form of "discipline other than discharge" upon Mr. Campbell. But the court also acknowledged that any such measure would be subject to further grievance procedures, and it expressed no opinion concerning whether public policy would require that any such discipline be sustained. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

Regrettably, racial and sexual harassment against both employees and non-employees continues to be a recurring problem in today's modern workplaces. Notwithstanding both the strong condemnation of such harassment by this Court and the Congress, and this Court's continuing recognition that federal courts should not enforce contracts or arbitration awards that offend such public policy, the courts of appeals remain deeply divided over the proper approach to take in cases where arbitral awards order reinstatement of employees who have been discharged for racial or sexual harassment — particularly where the harassment involves non-employees. The courts of appeals have adopted substantially different approaches to that question, and this Court's most recent decision in the "public policy" doctrine area, *Eastern Associated Coal Corp.*, does not purport to address or resolve the matter. Thus, this Court's intervention is needed, both to provide much needed guidance to the confused lower courts and to reinforce the nation's condemnation of contracts approving race discrimination

and its efforts to promote voluntary compliance with federal anti-discrimination policy.

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT CONCERNING WHETHER ARBITRAL AWARDS REINSTATING EMPLOYEES WHO HAVE ENGAGED IN HARASSMENT VIOLATE PUBLIC POLICY AND ARE UNENFORCEABLE.

As noted by the district court in this case, Pet. App.15a-18a, there is a multi-circuit split of authority over the question whether arbitral awards reinstating employees who have engaged in sexual or racial harassment violate a sufficiently express, well-defined, and dominant public policy such that they are unenforceable. Commentators have also noted this deep judicial conflict. *See, e.g.*, Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 17 (1994) (noting the "divergent" decisions among the courts of appeals on the issue, with "[t]wo courts [then having] upheld the arbitrator's decision to reinstate the discharged employee" and "[t]wo courts [having] vacated the award as contrary to public policy"). Specifically, decisions of the Fourth, Seventh, and Tenth Circuits flatly conflict with decisions of the Second and Third Circuits in their treatment of the issue, and the Eleventh Circuit in this case has now adopted a third approach that is inconsistent with both lines of cases.

The decision below is, for example, directly contrary to the Third Circuit's decision in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992). That case involved a bakery employee who had been discharged for sexually harassing a customer's employee on the premises of the customer's business. *See id.* at 1438-39. The employee's union grieved the discharge, and the arbitrator issued an award ordering the employee's reinstatement on the ground that the

bakery had not adequately investigated the circumstances of the alleged harassment. *See id.* at 1439. As here, the district court vacated the arbitrator's award, finding it to be violative of public policy. *See id.* at 1440. Unlike here, the Third Circuit affirmed, finding that there are "well defined and dominant public polic[ies]" that "can be ascertained by reference to law and legal precedent" both "concerning sexual harassment in the workplace" and "favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace." *Id.* at 1441-42. The court held that the award violated those public policies both because it "would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred," and because "it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Id.* at 1442. *Stroehmann Bakeries, Inc.* cannot be reconciled with the decision below, which reversed a district court's finding of a public policy violation where the misconduct underlying the decision was *not* disputed.

The Second Circuit has also held, in conflict with the decision below, that the public policy against discrimination in the workplace embodied in Title VII and related laws precluded enforcement of an arbitral award reinstating an employee who had been discharged for sexual harassment. *See Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990). *Newsday, Inc.* involved a discharge of an employee for sexually harassing several co-workers. *See id.* at 842. The arbitrator ruled in favor of the union's grievance and ordered reinstatement, concluding that "[t]hese offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline." *Id.* at 843. The district court vacated the award as contrary to public policy, *see id.* at 842-43, and the Second Circuit affirmed. The *Newsday, Inc.* court acknowledged the "well-recognized" public policy against

harassment in the workplace, as set out in Title VII, and noted that "Title VII places upon an employer the responsibility to maintain a work place environment free of sexual harassment." *Id.* at 844. The Second Circuit concluded that the public policy against harassment "is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser." *Id.* at 843. Indeed, the court concluded that reinstating the employee would "completely disregard[] the public policy against sexual harassment in the work place," and, "[a]bove all," would "prevent[] Newsday from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.* at 845.

The decision below is also inconsistent with another line of cases that, while holding that public policy does not require the discharge of every harasser, recognizes that public policy requires an arbitration award to itself provide for at least some discipline for an employee engaging in racial or sexual harassment. For example, in *Westvaco Corp. v. United Paperworkers International Union, AFL-CIO*, 171 F.3d 971 (4th Cir. 1999), while the Fourth Circuit reversed a district court's application of the public policy doctrine to an arbitral award reinstating an employee discharged for sexual harassment, it expressly recognized that public policy nonetheless required that the arbitration award provide for at least some lesser discipline instead of discharge. *See id.* at 973-74, 977. The Fourth Circuit reasoned that, "while it is certainly true that there is a public policy against sexual harassment, the district court formulated it in too general a fashion." *Id.* at 977. The court held that "[t]here is no public policy that every harasser must be fired," but rather "a company must exercise reasonable care to prevent and correct promptly any sexually harassing behavior." *Id.* at 977 (internal quotation marks and brackets omitted). The court held that the "strict" nine-month suspension imposed by the arbitrator in lieu of termination satisfied that obligation. *See id.* The Fourth Circuit emphasized that it was adopting "a narrow implementation" of the

public policy exception due to its "reluctance to invoke broad nostrums of public policy to void private bargains." *Id.* at 978.

The Seventh Circuit came to a similar conclusion in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America, AFL-CIO*, 959 F.2d 685 (7th Cir. 1992). The grievant in *Chrysler Motors Corp.* had been terminated by an automobile manufacturer for sexually assaulting a female co-worker and then was reinstated by a labor arbitrator. *See id.* at 686. While acknowledging that "[t]he public policy against sexual harassment in the work place is well-recognized," *id.* at 687, and that "[e]mployers must take all necessary steps to prevent sexual harassment in the work place," *id.* at 687-68, the Seventh Circuit found that the arbitrator's decision that "a 30-day suspension rather than discharge was an adequate sanction" was reasonable, and thus that the award should be allowed. *Id.* at 689.

Finally, the Tenth Circuit addressed an arbitrator's award reinstating an employee who had been fired for sexually assaulting a customer in *Communication Workers of America v. Southeastern Electric Cooperative*, 882 F.2d 467 (10th Cir. 1989). In that case, a utility company sued, challenging the validity of an award reducing a termination of a harasser to a one-month suspension. *See id.* at 468. The court noted that the arbitrator's decision finding that there was no just cause for the employer to terminate the grievant, but rather only cause to impose lesser sanctions, "fully incorporated th[e] important concern" with "preventing the sexual assault and abuse of women," precisely because the arbitrator had considered those concerns and addressed them through the lesser sanctions. *Id.* at 469. The Tenth Circuit stated that, in such circumstances, a court "cannot substitute [its] understanding of the workplace and judgment of [the grievant's] conduct" for that of the arbitrator. *Id.*

This latter group of decisions is inconsistent with the Eleventh Circuit's decision below. As noted, each of these decisions expressly relied upon the arbitrator's imposition of lesser punishments in finding that the challenged award did not violate public policy. The decision below, on the other hand, upheld the validity of an award that found the grievant's harassing behavior not to be cognizable under the company anti-harassment policy as an initial matter, Pet. App. 43a-44a, and which itself substituted no lesser penalty on the harasser. The arbitrator and, by enforcing the arbitrator's award, the court below did not understand "public policy" to require the imposition of any sanction for the racial harassment of a non-employee, whereas these other three circuits held that public policy requires at least some such sanction for the harassment (albeit not necessarily discharge, as the Third and Second Circuits have held).

In sum, the courts of appeals are split three ways on the question whether an arbitrator's award reinstating an employee who has been discharged for racial or sexual harassment — including harassment of non-company personnel — violates a well-defined and dominant public policy and is thus unenforceable. Two circuits have held that such awards violate public policy when they overturn an employer's discharge decision; three circuits have held that such awards are permissible where they replace the termination sanction with a lesser punishment adequate to implement the public policy against discrimination in the workplace; and one circuit — *i.e.*, the court below — has held that such awards are permissible even without any alternative punishment whatsoever being imposed as part of the arbitral decision. As noted above, commentators have repeatedly acknowledged this judicial split. *See, e.g.*, Stephen Buehrer, *A Clash Of The Titans: Judicial Deference To Arbitration And The Public Policy Exception In The Context Of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 267, 281 (1998) (discussing "the current split" among the courts of appeals);

id. at 297 ("Given the current confusion over the scope and breadth of the public policy exception, the United States Courts of Appeals split when faced with arbitration awards returning accused harassers to the workplace."); Sarles, *supra*, 17 Harv. Women's L.J. at 17 (noting the "divergent" court of appeals decisions); Chris Baker, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. Cin. L. Rev. 1361, 1361-62 (1993) (noting that "the federal circuits are split concerning the proper scope of the public policy exception to labor arbitral awards").

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING AND IN NEED OF PROMPT RESOLUTION BY THIS COURT.

While judicial uncertainty of the degree exhibited by the courts of appeals on this issue would warrant review by the Court in any event, a prompt resolution of this conflict is particularly imperative here. This case involves a confluence of considerations heightening the need for a prompt and uniform national resolution of the question presented.

In the first place, resolution of the conflict is necessary to promote the long-recognized and fundamental federal objective of combating race discrimination, an area where national uniformity and commitment is of central importance. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination."). This Court has long stood vigilant in protecting "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989); *accord, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from

denial of cert.) (acknowledging the strong interest "in preventing private 'discrimination'" on the basis of race). This judicial supervision is particularly appropriate in the context of the public policy doctrine, which is directed toward preventing harms in broad classes of cases by deterring the formation of improper contracts, and not just toward remedying the immediate case at hand. *See, e.g., Weil v. Neary*, 278 U.S. 160, 173-74 (1929) ("What is struck at in the refusal to enforce contracts [that violate public policy] is not only actual evil results but their tendency to evil in other cases."). Indeed, courts have led the attack on race discrimination by, among other things, refusing to enforce contracts that condone racial discrimination. *See, e.g., Hurd v. Hodge*, 334 U.S. 24 (1948).

Second, and regrettably, the problem of workplace discrimination generally, and harassment in particular, remains significant. Roughly 29,000 claims of racial harassment and other forms of racial discrimination have been filed every year between 1992 and 2000. *See* "Charge Statistics FY 1992 Through FY 2000," at www.eeoc.gov/stats/charges.html. The trend in the federal courts has also been toward continued large numbers of similar claims; the number of employment discrimination cases filed has generally risen, from 8,563 in 1988 to 21,111 in 2000. *See* Richart T. Seymour & John F. Aslin, *Equal Employment Law Update* at viii (2000 ed.). Moreover, as this Court's own docket illustrates, racial and sexual harassment claims constitute a sizeable portion of such claims. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (holding that workplace harassment may be cognizable under Title VII even if it does not seriously affect the employee's psychological well-being); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing the conditions for vicarious employer liability for workplace harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (same). Where so many claims arise, the need for clear rules about the

circumstances in which courts may properly intervene to overturn arbitration awards involving such claims is especially important.

Finally, the need for clear rules is also heightened in this labor-management context. These arbitration cases arise under section 301 of the Labor-Management Relations Act. "The subject matter of § 301(a) is peculiarly one that calls for uniform law." *Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (internal quotation marks omitted); *accord, e.g., Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 859 (1987) (noting need for national uniformity in discussing scope of preemption). Yet the deep split in the federal judiciary regarding the question presented for review in this case undermines this important policy in favor of national uniformity of legal principles affecting labor-management relations. As one writer has concluded in urging the Court to resolve the circuit split at issue in this case, this "is exactly the type of issue a court of last resort should decide." Baker, *supra*, 61 U. Cin. L. Rev. at 1362; Buehrer, *supra*, 6 Am. U. J. Gender & L. at 292-93 ("Until the Supreme Court clarifies the appropriate scope of the [public policy] exception, decisions will continue to vary in their application of the doctrine.").

III. THE DECISION BELOW MISUNDERSTANDS AND MISAPPLIES THE PUBLIC POLICY DOCTRINE.

On the merits, the decision below is plainly in error. The decision below upholds an arbitral award requiring reinstatement of, and back pay and benefits for, an employee on the sole ground that the employee racially harassed a *non*-employee rather than an employee. The award itself provides for no discipline at all for the racial harassment that occurred here; and, while the court below raised the possibility that the employer might still be able to impose an alternative sanction, the court below refused to even express an

opinion about whether any such discipline would be permitted by the collective bargaining agreement or required by public policy. As issued, the arbitration award in effect condones racially discriminatory behavior by barring the employer's punishment of it, and the award (and the decision approving it) thus violates the deeply entrenched public policies against racial discrimination in contracts and in the workplace, as reflected in Title VII, section 1981, and the LMRA, as well as the federal public policy favoring voluntary employer compliance with federal anti-discrimination principles.

A. The Public Policy Doctrine Ensures That Courts Do Not Enforce Illegal, Immoral, or Unconscionable Contracts.

It is well-settled that, at common law, courts properly refused to enforce illegal or immoral contracts as violative of public policy. *See, e.g.*, *Trist v. Child*, 88 U.S. 441, 448 (1874) ("It is a rule of the common law of universal application, that where a contract express or implied is tainted [because it is illegal or inconsistent with sound policy and good morals], as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."); *see also Oscanyan v. Arms Co.*, 103 U.S. 261, 267 (1880) (refusing to enforce "a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy"). This common law principle is set out in the Restatement (Second) of Contracts, which provides that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178(1); *see also id.* § 179 (noting that public policy may be derived from "legislation relevant to such a policy" or "the need to protect some aspect of the public welfare"). The public policy doctrine has its

roots in the common law principle that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

As this Court has repeatedly recognized, the public policy doctrine remains a vital part of Anglo-American jurisprudence, including federal jurisprudence. *See, e.g.*, *Eastern Associated Coal Corp.*, 531 U.S. at 63. The doctrine finds its continuing justification in the fact "that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). The Court has applied these principles to find unenforceable private agreements that violate provisions of positive law or general principles of public policy that are "well-defined and dominant." *W.R. Grace & Co. v. Local Union 759, Int'l Union of Limited Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

For example, *Trist* involved an action seeking to enjoin a claimant from recovering money from the United States treasury until the claimant paid for the respondent's services in lobbying the Congress to pay the claim. *See* 88 U.S. at 441-42. While the Court held that the requested injunction was not a proper remedy for a private agreement and was precluded by statute, the Court placed primary emphasis on "an objection of still greater gravity," the public policy doctrine. *Id.* at 448. Tracing the doctrine back to Roman law, *see id.*, the Court emphasized that "[i]n our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals." *Id.* The Court collected over a dozen cases applying this principle to preclude the enforcement of private contracts, *see id.* at 449, and concluded that the contract at issue,

which "was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate," was "contrary to the plainest principles of public policy." *Id.* at 451.

More recently, in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), this Court applied the public policy doctrine to allow an illegality defense in an action to enforce contracted contributions to union welfare funds. *See id.* at 74-76. Noting that "[t]here is no statutory code of federal contract law," the Court nonetheless found that its "cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Id.* at 77. In that case, the Court held that, if the parties' agreement ran contrary to the Sherman Act or the National Labor Relations Act, the federal courts should properly decline enforcement. *See id.* at 87-89.

Perhaps even more to the point here, the Court applied the public policy doctrine in the context of private racial discrimination in the seminal case of *Hurd v. Hodge*, 334 U.S. 24 (1948). *Hurd*, a companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948), involved the attempted enforcement of a racially restrictive covenant in the deeds to several residential lots. *See* 334 U.S. at 26. The Court held "that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States." *Id.* at 34. "Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Id.* at 35. Declining to "presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States," the Court held that such racially restrictive covenants are judicially unenforceable. *Id.* at 35-36.

The application of the public policy doctrine to labor arbitrators' awards is a special and, indeed, more powerful application of these longstanding principles. *See, e.g.*, *W.R. Grace*, 461 U.S. at 766. In labor cases, Congress has conferred a unique "common lawmaking" power upon the federal courts. *See Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws"); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403 (1988) (noting broad federal common lawmaking power in "controversies involving collective-bargaining agreements"). The "public policy" doctrine is a natural application of this congressionally-conferred common lawmaking power. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966) (acknowledging that "there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts").

B. The Arbitral Award In This Case Violates Well-Defined And Dominant Public Policies Against Contracts Condoning Racial And Sexual Harassment In The Workplace And Favoring Voluntary Compliance With Anti-Discrimination Laws.

The arbitration award under review in this case should be held unenforceable under this public policy doctrine, as it violates well-defined and dominant public policies against contracts condoning race discrimination and in favor of voluntary compliance with anti-discrimination laws. The arbitrator's award reinstating the grievant is expressly premised upon his determination that, under the workplace rules established pursuant to this collective bargaining agreement, Tamko was without authority to discharge the grievant for harassing non-employees. Pet. App. 44a ("[I]t is my finding that the Workplace Har[]assment Policy specifically is limited to

har[]assment between an employee and other employees."). Thus, the award did not involve the propriety of the remedy — the question where deference to the arbitrator's judgment is at its zenith. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (holding that the proposition that deference to labor arbitrators is appropriate "is especially true when it comes to formulating remedies" (quoted with emphasis added in *Misco, Inc.*, 484 U.S. at 41)). Rather, the arbitrator decided that the conduct of racially harassing non-employees working full-time on Tamko premises was not punishable by discharge in this case as an initial matter, pursuant to the workplace rules limited by the collective bargaining agreement. Pet. App. 43a-44a. Under *Eastern Associated Coal* and earlier cases, therefore, the Court must treat the arbitrator's award as if it reflects an agreement of the parties not to discharge an employee for racially harassing non-employees. 531 U.S. at 62. But such an agreement is plainly at odds with well-defined and dominant public policy; and the court of appeals's decision nonetheless sustaining the award should be reversed.

The Eleventh Circuit's first error was in its simple equation of the scope of the public policy doctrine with the requirements of positive law. The decision below determined that the award "does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation." Pet. App. 3a. From this premise, the court immediately proceeded to the conclusion that, "[t]herefore, we conclude that the award does not run contrary to an explicit, well-defined, and dominant public policy." Pet. App. 3a. This conclusion is accompanied by a citation to *Eastern Associated Coal Corp*; but that case expressly rejected any such limitation on the public policy doctrine. *See* 531 U.S. at 63. While Justice Scalia argued that the public policy doctrine should be cabined to the positive law, *see* 531 U.S. at 67-69 (Scalia, J., dissenting), the majority expressly declined to do so, *see id.* at 63

(agreeing, "in principle, that court's authority to invoke the public policy exception is *not* limited solely to instances where the arbitration award itself violates positive law" (emphasis added)). Moreover, as noted above, the public policy doctrine has historically extended beyond positive law to prohibit judicial enforcement of immoral as well as illegal agreements; and where racially restrictive covenants were in issue, the Court expressly went beyond positive law in holding them to be against public policy. *See, e.g., Hurd*, 334 U.S. at 34-35. The Eleventh Circuit's complete failure to address whether federal race discrimination policy may also extend beyond positive law in this context, and thereby prevent enforcement of arbitral awards reinstating individuals who racially harass non-employees, underscores that court's failure adequately to appreciate the important public policies at issue in this case (much less the degree to which the award frustrates those public policies). Indeed, the arbitral award, and the decision approving it, are irreconcilable with the long-standing policy of courts not to enforce contracts that condone racial discrimination. *See, e.g., id.*; *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that race-based admission policies to private schools violate section 1981).

In any event, the Eleventh Circuit's unelaborated conclusion that the award "does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation," Pet. App. 3a, is demonstrably wrong. As noted above, under *Eastern Associated Coal Corp.* and earlier cases, the arbitrator's conclusion that the grievant may not be discharged for racially harassing a non-employee (as opposed to an employee) must be presumed to reflect a contractual agreement of the parties. But any such agreement is flatly incompatible with Title VII and section 1981, as interpreted in the case law, and with the applicable regulations; such an agreement providing for no discipline for a

racial harasser would plainly frustrate the terms and objectives of the nation's anti-discrimination laws.

To begin with, the Fifth Circuit long ago expressly rejected the argument that a charge of discriminatory conduct "could not relate to an unlawful employment practice because it alleges discrimination directed to [the employer's] patients and not toward any employee." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). Concluding that "a working environment heavily charged with discrimination may constitute an unlawful practice," *Rogers* held that an employer may be held liable under Title VII for allowing discrimination against *non*-employees. *Id.* at 239. This Court favorably discussed *Rogers* "[i]n concluding that so-called 'hostile environment' (*i.e.*, non *quid pro quo*) harassment violates Title VII" in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986). The Court's approval of "hostile environment" Title VII liability itself reflects the possibility that liability can be established based upon pervasive discrimination against non-employees. *See also Harris*, 510 U.S. at 21-23. In short, although the arbitrator and the court below appeared not to appreciate it, "[i]t is well-established that discrimination against non-employees can pollute a work environment in violation of Title VII." *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1448 (E.D. Cal. 1995).

In any event, 42 U.S.C. § 1981 undisputedly extends far outside the employment context to prohibit harassment in the performance of contractual obligations generally. For example, courts have frequently allowed section 1981 actions against retail stores by non-employee shoppers for alleged discriminatory treatment, *see, e.g.*, *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 873-80 (6th Cir. 2001), and against restaurants by non-employee patrons, *see, e.g.*, *Laroche v. Denny's Inc.*, 62 F. Supp. 2d 1375, 1385 (S.D. Fla. 1999); *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1050 (N.D. Ill. 1998); *Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 518-21 (W.D.N.C. 1998). Such cases have permitted

liability merely on the basis of the performance or formation of contractual relationships in a racially "disturbing atmosphere." *McCaleb*, 28 F. Supp. 2d at 1048. Under such case law, Tamko has exposure to potential liability for the racial harassment of Mr. Williams in the conduct of the Cummings/Tamko contractual relationship, and rejection of Tamko's authority to discharge Mr. Campbell for engaging in such harassment flies in the face of Tamko's obligation to comply with section 1981.

The Eleventh Circuit's approval of this arbitral award also conflicts with the principles of federal common law that govern this dispute under the CBA, and that are incorporated into positive statutory law by section 301 of the LMRA. "Plainly, national labor policy embodies the principles of non-discrimination as a matter of highest priority, and it is a commonplace that [the Court] must construe [a federal labor statute] in light of the broad national labor policy of which it is a part." *Emporium Capwell Co. v. W. Addition Cmty. Org., NLRB*, 420 U.S. 50, 66 (1975) (citation omitted); *accord Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944) (emphasizing that, under the Railway Labor Act, "discriminations based on race alone are obviously irrelevant and invidious"). Both the court of appeals and the district court in this case in fact acknowledged that the elimination of racial discrimination in the workplace is a vital public policy, also embodied in Title VII and section 1981. Contrary to the Eleventh Circuit's judgment, however, the common lawmaking power that federal courts exercise under the LMRA, *see, e.g., Textile Workers of Am.*, 353 U.S. at 456, plainly authorizes courts to decline to enforce awards that thwart these fundamental federal policies against discrimination in the workplace by reinstating racial harassers without any discipline at all for their misconduct; the parties to a collective bargaining agreement may simply not agree — as *Eastern Associated Coal* requires the Court to assume from the arbitrator's award — to allow racial harassment of non-employees

to go unpunished. As the National Labor Relations Board has stated, "no court has permitted the existence of a collective-bargaining agreement or practices under or outside such agreements to stay its hand in ordering an employer or union to eliminate racial discrimination." *Laborers' Int'l Union of N. Am., AFL-CIO, Local 478*, 204 NLRB 357, 359 (1973). *Cf. Handy Andy, Inc.*, 228 NLRB 447, 456 (1977) ("[T]he [National Labor Relations] Board has long recognized its obligation to consider issues concerning discrimination on the basis of race, sex, national origin, or other unlawful, invidious, or irrelevant reasons when they are raised in an appropriate context, and we shall continue to do so.").

Indeed, the arbitrator's finding that Mr. Campbell's racially harassing conduct was entirely permissible under the applicable harassment policy amounts to a facial violation of the public policy requiring Tamko to "carry[] out its legal duty to eliminate [racial] harassment in the work place." *Newsday, Inc.*, 915 F.2d at 845. The award assumes a total deprivation of Tamko's ability to carry out its obligations with respect to the broad class of racially harassing employee behavior directed toward non-employees; yet Tamko has a legal duty to address *all* instances of racially harassing behavior in the workplace. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); 29 C.F.R. § 1604.11 (establishing employer obligation to prevent and remedy harassment). As discussed above, even the courts that have found no public policy violation in awards reinstating harassers have expressly relied on the fact that lesser penalties remained in force under the applicable arbitration award. *See, e.g., Westvaco Corp.*, 171 F.3d at 977 (noting that "a nine-month suspension without pay" was adequate to allow the employer to satisfy its duty to "exercis[e] reasonable care to promptly correct harassing behavior"); *Chyrsler Motors Corp.*, 959 F.2d at 689 (concluding that "a 30-day suspension rather than discharge was an adequate sanction"); *Communication Workers of Am.*, 882 F.2d at 469 (finding that

the reduction to a one month suspension without pay "fully incorporated th[e] important concern" in preventing sexual harassment in the workplace). Here, the arbitration award includes no penalties or conditions; and the Eleventh Circuit ultimately refused to opine whether any such additional penalties or conditions had to be or could be imposed. Pet. App. 4a. As it stands, therefore, the arbitration award leaves racial harassment of non-employees totally unpunished, and thus wholly frustrates the objectives of the federal anti-discrimination laws.

The Eleventh Circuit's citations to *Eastern Associated Coal Corp.* do not support a contrary conclusion. The Court in that case engaged in an issue-specific inquiry into the statutory and regulatory regime in which the asserted public policy (against the use of illegal drugs in the workplace) was grounded. *See* 531 U.S. at 63-67. There, unlike here, there was no violation of positive law. *See id.* at 63. Moreover, that case involved a highly detailed regulatory scheme that balanced competing concerns, such as the goal of rehabilitation of illegal drug users. *See id.* at 64-65. By contrast, the statutes at issue here, Title VII and section 1981, are much more general mandates that implement a national public policy of the highest order and leave far more room for judicial interpretation and explication; indeed, under this Court's cases, section 301 of the LMRA requires such "common lawmaking" explication. Furthermore, in contrast to the regulatory scheme at issue in *Eastern Associated Coal*, here there is no relevant competing interest that can compete with the policy against racial harassment in the workplace. In short, to the extent that it is relevant at all, *Eastern Associated Coal Corp.* reinforces Tamko's argument that the dominant and express public policy against race discrimination in the workplace precludes the award at issue here, which did not merely reinstate an employee with reduced discipline and conditions, but rather reinstated the employee with no discipline and no conditions.

The Eleventh Circuit's failed attempt to address this last defect in the arbitral award in fact involved a shell game of shifting premises. The Eleventh Circuit initially asserted that "nothing in the award is inconsistent" with the requirement of "voluntar[y] compliance with Title VII" because the award does not "*itself* preclude Tamko from imposing some form of discipline on Campbell other than discharge." Pet. App. 3a (emphasis added). But when, later in the opinion, the Eleventh Circuit addresses the propriety of any such alternative forms of discipline, the court inconsistently acknowledged that it was in fact "express[ing] no opinion" whether the collective bargaining agreement would allow such alternative discipline, much less whether public policy required it. Pet. App. 4a. Indeed, in suggesting that alternative discipline may be possible, the court of appeals appears to have ignored both the arbitration award's clear holding that Mr. Campbell's conduct simply did not violate Tamko's anti-harassment policy and the collective bargaining agreement's bar on the arbitrator (or anyone else) reviewing management's determination of the proper punishment. Pet. App. 41a, 43a-44a. In any event, the discussion in no way alters the court's holding that an arbitration award (and thus, by hypothesis, a collective bargaining agreement) may require reinstatement of a racial harasser without itself imposing any sanction whatsoever. So understood, the arbitration award plainly precludes Tamko from "exercis[ing] reasonable care to prevent and correct promptly any [racially] harassing behavior." *Burlington Indus.*, 524 U.S. at 765.

There are substantial arguments that the public policy against racial discrimination in the workplace is so important that an employer's decision to discharge a harasser may not be disturbed by an arbitrator without violating that public policy regardless whether a lesser punishment remains in effect. Two circuits have effectively so held. *See Stroehmann Bakeries, Inc.*, 969 F.2d at 1442; *Newsday, Inc.*, 915 F.2d at 843-45. But at the very least,

the authorities (other than the decision below) are unanimous in requiring that the imposition of some discipline, even if less severe than discharge, is necessary to satisfy the requirements of public policy, and that an arbitral award cannot simply reinstate a harasser with no penalty at all. *See Westvaco Corp.*, 171 F.3d at 977; *Chrysler Motors Corp.*, 959 F.2d at 689; *Communication Workers of Am.*, 882 F.2d at 469; *see also* Sarles, 17 Harv. Women's L.J. at 48-49 (noting that the imposition of alternative discipline "would be a sign that an arbitrator is at least cognizant of the multiple interests affected by the award"); Baker, 61 U. Cin. L. Rev. at 1389 (arguing that judicial deference to an arbitral award is appropriate "when an arbitrator reinstates with a lesser punishment"). The Eleventh Circuit stands alone in approving an award that reinstates a harasser with no alternative discipline.

The decision below is plainly wrong. It threatens to reduce the public policy doctrine to the enforcement of labor arbitrators' awards to a practical nullity. The decision ignores this Court's statements about the breadth of the public policy doctrine, misunderstands the requirements of positive law, neglects the federal courts' common lawmaking obligation under the LMRA, disregards the CBA itself, and entirely fails to address the basis for the arbitral award. Indeed, it ignores the long-standing judicial practice of refusing to enforce contracts that condone racial discrimination. To allow such a decision to stand would substantially undermine the important public policies against race discrimination at issue in this case, and improperly weaken the public policy doctrine generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

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